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Pa. Supreme Court Opinion

Oz Gas, Ltd. v. Warren Area Sch. Dist.
Nos. 10, 11, 12 WAP 2006
SUPREME COURT OF PENNSYLVANIA
938 A.2d 274; 2007 Pa. LEXIS 2882
March 5, 2007, Argued
December 27, 2007, Decided

JUDGES: MR. JUSTICE CASTILLE. CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, JJ. MR. JUSTICE CASTILLE. Mr. Chief Justice Cappy, Messrs. Justice Saylor, Eakin and Baer and Madame Justice Baldwin join the opinion.

OPINION

MR. JUSTICE CASTILLE

This appeal presents questions regarding the effect of this Court's decision in Independent Oil and Gas Association v. Board of Assessment Appeals of Fayette County, 572 Pa. 240, 814 A.2d 180 (Pa. 2002) ("IOGA"). IOGA held that Section 201(a) of the General County Assessment Law, 72 P.S. § 5020-201(a), precludes counties from collecting taxes on oil and gas reserves that remain in the ground. The specific issues are whether IOGA should apply retroactively and whether Section 5566b of the Local Tax Collection Law, 72 P.S. § 5511.1 *et seq.*,

governing refunds of taxes paid where the taxing authority was not legally entitled to the payment, applies automatically in light of that decision. The Commonwealth Court addressed only the issue of the automatic application of Section 5566b and held that the language of the statute clearly and unambiguously commands that, if a taxpayer files a written claim for a tax refund within three years of payment of the tax to a political subdivision that was not entitled to collect the tax, the taxpayer is entitled to a refund. For the reasons that follow, we reverse.

From 1999 through 2002, appellee Oz Gas paid *ad valorem* taxes on its oil and gas interests to Warren Area School District, Warren County, Triumph Township, Deerfield Township, Forest County and Forest Area School District ("Taxing Authorities") pursuant to Section 201(a) of the Assessment Law. On December 19, 2002, this Court issued the IOGA decision finding that counties are not authorized to tax oil and gas interests. Consequently, on May 13, 2003, Oz Gas filed a complaint in the Court of Common Pleas of Warren County, seeking a refund for the previous three years of taxes it had paid, invoking the refund provision of Section 5566b.[1]

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[1] Shortly thereafter, on July 9, 2003, the County Commissioners Association of Pennsylvania filed a petition to intervene, which was subsequently withdrawn on September 29, 2003. In addition, on August 11, 2003, Centre, Clinton, Forest and Jefferson Counties petitioned to intervene. On October 10, 2003, the trial court denied the petitions of Centre, Clinton and Jefferson Counties, but granted Forest County's petition. On November 12, 2003, Forest Area School District filed a petition to

The Taxing Authorities filed motions for summary judgment, arguing that Section 5566b permits the recovery of only those taxes paid during the previous three years to which the taxing authority had no legal entitlement. Prior to this Court's decision in IOGA, the Taxing Authorities argued, they were legally entitled to collect the taxes in dispute. Therefore, the Taxing Authorities contended, Section 5566b did not authorize a refund in this instance. They further argued that IOGA announced a new principle of law, and as such, the decision should not be applied retroactively to change the legality of tax assessments made prior to the decision. Oz Gas filed a cross-motion for summary judgment, arguing that IOGA should apply retroactively because it was applied retroactively to the plaintiffs in that case and this Court did not expressly state that its application was prospective only. Further, Oz Gas claimed, IOGA did not represent such a change in the law that prospective-only application of the decision was warranted.

The trial court granted the Taxing Authorities' motions for summary judgment. The court first considered whether Section 5566b automatically

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intervene, which was granted with the consent of all parties. On February 24, 2004, Forest County sought to withdraw as intervenor, which the trial court accepted with the consent of all parties. Thus, the defendants remaining in the trial court were Warren Area School District, Warren County, Triumph County and Deerfield Township as defendants and Forest Area School District as intervenor.

commanded retroactive application of IOGA. Section 5566b provides as follows:

> (a) Whenever any person or corporation of this Commonwealth has paid or caused to be paid, or hereafter pays or causes to be paid, into the treasury of any political subdivision, directly or indirectly, voluntarily or under protest, any taxes of any sort, license fees, penalties, fines or any other moneys to which the political subdivision is not legally entitled; then, in such cases, the proper authorities of the political subdivision, upon the filing with them of a written and verified claim for the refund of the payment, are hereby directed to make, out of budget appropriations of public funds, refund of such taxes, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled. Refunds of said moneys shall not be made, unless a written claim therefor is filed, with the political subdivision involved, within three years of payment thereof.
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> (b) The right to a refund afforded by this act may not be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund or otherwise, for recovery of moneys paid as aforesaid, unless the claim for refund is for the recovery of moneys paid under a provision of a statute, ordinance or resolution subsequently held, by final judgment of a court of competent jurisdiction, to be unconstitutional, or under an interpretation of such provision subsequently held by such court, to be erroneous.
>
> (c) (1) * * * *

> (2) For purposes of this subsection, the term "political subdivision" means a county, city, borough, incorporated town, township, home rule municipality, school district, vocational school district and county institution district.

72 P.S. § 5566b. The court found that the language of the statute did not require retroactive application. The court based its conclusion in this regard on this Court's decision in another case involving the retroactivity of a decision holding a tax invalid, American Trucking Associations, Inc. v. McNulty, 528 Pa. 212, 596 A.2d 784 (Pa. 1991). McNulty was before this Court on remand from the U.S. Supreme Court, which had determined in a prior case that certain fees or taxes imposed by Pennsylvania on interstate truckers were unconstitutional as a violation of the Commerce Clause. The matter was remanded to determine whether the High Court's ruling should be applied retroactively. The McNulty Court held that the constitutional ruling applied only from the date of the decision forward because the tax was not unconstitutional until the U.S. Supreme Court so declared.

The trial court noted that Section 5566b contemplates retroactivity, but rejected Oz Gas's argument that the refund provision requires retroactive application of a case decision any time a statute or ordinance is held to be unconstitutional or its existing interpretation is found to be erroneous. The court found that subsection (b) merely provides an avenue of appeal in instances where the right to a refund is not based upon a finding that the tax statute is invalid, stating that subsection (b) plainly means: "a taxpayer is not required to pursue

alternate refund remedies if the refund is claimed pursuant to a provision of a tax statute subsequently held by a court to be erroneous." Trial Ct. Op. at 7. Looking to this Court's decision in McNulty, the court further noted that, even though the refund statute at issue in that case was worded differently than Section 5566b, the same analysis pertained because both McNulty and the matter *sub judice* involve the question of a governmental entity's entitlement to taxes:

> Applying McNulty to the instant case, it is clear that this Court's decision cannot be based upon a strict analysis of the statutory wording in a vacuum. Instead, the Court must determine whether or not the [IOGA] decision is retroactive or prospective. If, in this Court's determination, the [IOGA] decision is retroactive, then Section 5566b(a) would apply and the tax would have been one to which the municipalities were "not legally entitled." However, if this Court determines that the [IOGA] decision is not to be applied retroactively but is only prospective, then the municipalities were, at the time of collection, legally entitled to the taxes which they collected from [Oz Gas] for oil, gas and mineral interests and [Oz Gas] has no valid claim for a refund under Section 5566b(a).

Id. at 6.

The court then turned to the retroactivity of IOGA independent of Section 5566b. On this question, the court applied the three-prong test for determining retroactivity as a jurisprudential matter, as set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296

(1971). The Chevron analysis looks to: (1) whether the decision established a new principle of law; (2) a balancing of the merits by looking at the history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation; and (3) an evaluation of the equities involved. As to the first factor, the trial court concluded that IOGA did announce a new principle of law because this Court "decided an issue of first impression whose resolution was not clearly foreshadowed." Tr. Ct. Op. at 9 (citing Chevron, 404 U.S. at 106). The trial court's conclusion that IOGA was not foreshadowed was based upon E. H. Rockwell & Co. v. Warren County, 228 Pa. 430, 77 A. 665 (Pa. 1910), where this Court held that oil and gas interests underlying unseated lands were taxable as real estate and were actually defined as real estate.[2] The trial court noted that, since Rockwell, "local governments have been taxing oil and gas interests for decades," and several cases since Rockwell identified oil, gas and minerals as "real estate and taxable." Thus, according to the trial court, the decision in IOGA represented a departure from decades of taxation of oil and gas interests, upon which taxing authorities had relied. Id.

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[2] "Unseated land" is land that is not listed on the tax rolls by a specific owner. In Rockwell, the Court held that if one party owns the land and another owns the subsurface oil and gas interest on these unseated lands, both interests are taxable as real estate.

Regarding the second Chevron factor, the trial court stated that the purpose of the taxing statute is straightforward -- to allow political subdivisions to collect taxes on real estate. The overall effect of IOGA, in the court's view, was to grant the plaintiff in that case equitable and declaratory relief which, by its nature, is forward looking. In addition, the court noted that retroactive application would deprive political subdivisions of revenues already disbursed for the needs of the local governments and would, therefore, thwart the purpose of the statute. Finally, in the court's view, the third factor, the equities, weighed heavily in favor of prospective application of IOGA because for nearly 100 years property owners had paid *ad valorem* taxes on oil and gas interests, and tax sales had resulted from non-payment of those taxes. Retroactive application of IOGA would, in effect, invalidate each of those tax sales, perhaps leading prior owners to seek return of the properties lost to those tax sales. The court also recognized the burden on the Taxing Authorities of having to refund taxes paid for the three years prior to IOGA, which could prove financially devastating to small rural governments that have depended on the taxation of oil and gas interests. Thus, the trial court ultimately found that: "based on a careful analysis of the Chevron factors, this Court concludes that all three prongs are satisfied and that the [IOGA] decision should be applied prospectively only." Tr. Ct. Op. at 12.

Oz Gas appealed to the Commonwealth Court, which reversed in a brief, published *en banc* opinion authored by the Honorable Rochelle S. Friedman. The Honorable Renee Cohn Jubelirer dissented without opinion. The majority determined that the

language of Section 5566b is clear and unambiguous and plainly provides for a refund of taxes to which the taxing authority was not legally entitled, a determination that may result from a subsequent decision of a court. Oz Gas, Ltd. v. Warren Area Sch. Dist., 886 A.2d 336 (Pa. Cmwlth. 2005).[3] Given its finding that the refund statute alone was dispositive, the Commonwealth Court did not address Oz Gas's alternative argument in favor of retroactivity pursuant to Chevron.

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[3] The majority's reasoning reads, in its entirety, as follows:

> The language of [Section 5566b] is clear and unambiguous. A taxpayer who files a written claim for a tax refund within three years of payment of a tax is entitled to a tax refund if the political subdivision was not legally entitled to collect the tax. 72 P.S. § 5566b(a). Moreover, the taxpayer may seek the tax refund under the Refund Law where the taxpayer's claim is to recover taxes paid under a statutory interpretation of a taxing provision which a court subsequently held to be erroneous. 72 P.S. § 5566b(b). Here, Oz paid taxes to the taxing authorities from 1999 through 2002 under an interpretation of section 201(a) of the Assessment Law which our supreme court subsequently held was erroneous. [IOGA] Thus, Oz has a right to a tax refund for the taxes it paid under section 201(a) of the Assessment Law for the three years prior to the filing of its claim.

Oz Gas, 886 A.2d at 338.

This Court granted further review. Appellant Forest Area School District ("Forest") has filed a brief in this Court, and appellants Warren Area School District, Warren County and Deerfield Township (collectively "Warren") have filed a single, joint brief.[4] Regarding the issue of Section 5566b's scope, Forest argues that Section 5566b does not automatically entitle Oz Gas to a refund because the clear intent of the statute is to provide a refund only when the political subdivision is "not legally entitled" to the tax, a term that is not defined in the statute. According to Forest, the Commonwealth Court erred by finding that the requirement that the taxing authority is not legally entitled to the tax pursuant to Section 5566b(a) is met when, consistent with Section 5566b(b), the tax statute is subsequently found to be invalid by a court of competent jurisdiction. This intermingling of the subsections is, Forest claims, contrary to Section 1903(b) of the Statutory Construction Act, 1 Pa.C.S. § 1903(b), which provides that: "General words shall be construed to take their meanings and be restricted by preceding particular words." Forest contends that subsection (b) deals with alternative refund remedies unless the tax provision is held to be invalid, and that there is no indication in the statute that the alternative remedy provision is intended to define

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[4] Neither Warren County nor Deerfield Township filed petitions for allowance of appeal; nevertheless, they have joined in Warren Area School District's brief. Appellant Triumph Township filed a petition for allowance of appeal but did not file a brief in this appeal.

the term "not legally entitled" as used in subsection (a).

Forest further argues that the Commonwealth Court's interpretation of Section 5566b is in conflict with McNulty, where this Court held that a tax refund statute by itself did not resolve the question of whether a decision like IOGA, disapproving a tax, should apply retroactively. Instead, Forest submits, the court must look to judicial precedent to determine the issue of retroactivity as the question of retroactivity in this instance is a judicial question, not a legislative one, which must be resolved by applying the Chevron Oil test.

For its part, Warren adds that Section 5566b is a procedural statute establishing a mechanism for a taxpayer to seek a refund of taxes to which the taxing authority was not legally entitled, but it does not confer any self-effectuating, substantive right to a refund. Warren notes (as Forest does) that at common law there was no right to a refund even if taxes were mistakenly paid or wrongly assessed. Section 5566b, therefore, is significant in that it altered the common law by providing a mechanism for refund. Thus, according to Warren, Oz Gas is entitled to a refund only of any taxes paid after IOGA because, after that decision, the Taxing Authorities were not legally entitled to collect the taxes.

As to the issue of the retroactive effect of IOGA, both Forest and Warren argue that the proper means of determining whether a decisional rule should apply retroactively is the three-prong test set forth in Chevron, 404 U.S. at 106-07. Forest and Warren both argue that the equities in this instance weigh heavily in favor of prospective application of IOGA due to the

financial burden of refunding three years' worth of presumptively-valid tax assessments.

Oz Gas responds that, contrary to appellants' arguments, the General Assembly's decision to authorize refunds of a tax subsequently held to be invalid or inapplicable supersedes a court's authority to determine that a refund is not available, citing to First National Bank of Fredericksburg v. Commonwealth, 520 Pa. 244, 553 A.2d 937 (Pa. 1989). In enacting Section 5566b, Oz Gas argues, the General Assembly revealed its intention that, where a party pays taxes that are subsequently found to be uncollectable, the party is entitled to a refund of the taxes paid for a limited three-year period. Oz Gas contends that Section 5566b would be rendered meaningless if a court finding a tax invalid could give that finding prospective-only application, where it was plainly the legislative intention to provide a mechanism for obtaining a refund of payments made on an invalid tax. Oz Gas counters Forest's argument that the language of Section 5566b discussing taxes subsequently held invalid does not define the phrase "not legally entitled" by insisting that the only reasonable interpretation of Section 5566b would link the two phrases, with the concept of a subsequent holding of invalidity giving meaning to the term "not legally entitled."

On the issue of the retroactivity of IOGA, Oz Gas claims that retroactive application is compelled by the U.S. Supreme Court's decision in Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), where the High Court held that decisions involving interpretations of federal law must be given retroactive effect. Oz Gas argues that this matter involves a federal question,

namely the potential disparate treatment of the successful taxpayer in IOGA when compared to other taxpayers who paid the same invalid tax but may not be entitled to a refund. Finally, Oz Gas urges this Court to adopt the U.S. Supreme Court's holdings in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) (Opinion Announcing the Judgment of the Court) (judicial decisions should not be subject to selective prospective application), and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) (where state penalizes taxpayers for late payment, thus requiring taxpayers to pay disputed taxes prior to obtaining review, state must provide a clear remedy).

The issues are twofold: whether IOGA applies retroactively as a jurisprudential matter, and whether 72 P.S. § 5566b applies automatically in light of the retroactive application of IOGA. These issues involve pure questions of law; therefore, this Court's review is plenary. E.g., McGrory v. Commonwealth, Dep't of Transp., 915 A.2d 1155, 1158 (Pa. 2007); MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, 844 A.2d 1239, 1245 n.3 (Pa. 2004); Mosaica Acad. Charter Sch. v. Commonwealth, Dep't of Educ., 572 Pa. 191, 813 A.2d 813, 817 (Pa. 2002).

We turn first to the issue of the retroactivity of this Court's decision in IOGA. There is no dispute that, in the wake of IOGA, the taxes previously paid by Oz Gas in this instance are no longer collectible by the Taxing Authorities. The question is whether IOGA also renders those taxes uncollectible retroactively for a three-year look-back period. The trial court found that this Court's determination in

McNulty, as well as application of the traditional Chevron test for retroactivity, controls here. We agree.

McNulty involved a factual scenario similar to that presented here. In McNulty, a trucking association challenged Pennsylvania's axle tax and marker fees, which were assessed against common carriers. Ultimately, the U.S. Supreme Court found that such taxes and fees, when charged to carriers engaged in interstate commerce, violated the Commerce Clause of the U.S. Constitution, Article I, Section 8. Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987). On remand, the McNulty Court was charged with determining whether the U.S. Supreme Court's decision entitled the trucking association to a refund of taxes previously paid. While the matter was pending on remand, however, the U.S. Supreme Court granted *certiorari* on the very question presented on remand, *i.e.*, whether Scheiner applied retroactively or prospectively, and determined that the decision applied prospectively only. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990) (plurality opinion).

In Smith, the four-Justice plurality[5] applied the Chevron test and determined that: (1) the decision in Scheiner clearly established a new principle of law by declaring the highway taxes unconstitutional pursuant to the Commerce Clause; (2) retroactive application of the Scheiner decision would not forward the operation of the decision; and (3) the relevant equities dictated prospective application because the Legislature did not believe the taxes to be unconstitutional, the taxing authorities collected taxes that the authorities reasonably believed were valid, and refunding the taxes could deplete the state treasury. Id. at 179-82.

This Court in McNulty realized that, even after the Smith decision, the question remained open whether Scheiner was to be given "purely prospective application," *i.e.*, whether it was to be limited entirely to future cases, or instead, the benefit of the decision should be made available to the challenger in McNulty, which was the litigation in which the

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[5] Justice O'Connor authored the plurality opinion, which was joined by Chief Justice Rehnquist and Justices White and Kennedy. Justice Scalia concurred in the judgment, reiterating his dissenting position in Scheiner that the tax involved was constitutional but agreeing that, once Scheiner was announced, the tax could no longer be levied. Justice Stevens dissented, joined by Justices Brennan, Marshall and Blackmun, opining that a statute that is declared unconstitutional does not become unconstitutional as of the date of the decision so finding, but rather was always unconstitutional.

constitutional holding was announced. After analyzing the Smith plurality's view that Scheiner should be applied prospectively only, this Court explained the significance of the Smith plurality's view:

> Under a ruling that Scheiner is to be applied prospectively, it is as though the taxes collected prior to the date of the Scheiner decision were not unconstitutional. This is the very meaning of prospective application; the holding of unconstitutionality applies *from the date of decision,* and not before.

McNulty, 596 A.2d at 787. Ultimately, the McNulty Court, embracing the logic employed in the Smith plurality, and in a case involving a question of "pure" prospective application, held that the Scheiner decision, which struck down a state tax on constitutional grounds, applied prospectively only. This was so because, until the Scheiner decision issued, the taxes were deemed valid.[6]

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[6] The Smith plurality made clear that the question of the retroactivity versus prospectivity of a U.S. Supreme Court constitutional decision is itself a federal question. State courts, of course, are free to weigh in on such questions either in the first instance, or in the absence of clear guidance from the High Court. Given that Smith was a plurality decision, the McNulty Court was obliged to attempt to render a decision that would pass muster in the High Court.

IOGA differs from Scheiner in that IOGA found that the *ad valorem* taxes on oil and gas reserves, at issue in that case, were improper as a matter of statutory construction, and not on constitutional grounds. A reasoned argument could be made (as it was made by the dissenting opinion in Smith) that a taxing statute found to be unconstitutional (as in Scheiner) should be deemed unconstitutional from its inception because the constitutional provision the statute violated never changed. By contrast, a colorable argument can be made that an interpretation of language in a taxing statute, because it is not grounded in unchanging constitutional provisions, may be said to be effective from the date of the decision announcing the interpretation.

Had this Court found the taxes assessed pursuant to Section 201(a) of the General County Assessment Law to be unconstitutional, McNulty, which remains good law, would counsel a conclusion that the decision had only prospective application, even though a statute that fails to pass constitutional muster presumably never was constitutional. In IOGA, this Court interpreted Section 201(a) and determined that *ad valorem* taxes could not be assessed against oil and gas reserves that remained underground as a matter of statutory construction. If a finding that the same tax was unconstitutional, meaning that the tax was never validly collected, would be subject to prospective-only application, it would defy logic to hold that IOGA's holding, based in statutory interpretation, must apply retroactively. This is so because the effect of retroactive application remains the same, regardless of the basis for the invalidation of the tax. Accordingly, pursuant to this

Court's teaching in McNulty, we hold that the *ad valorem* taxes on underground oil and gas reserves are invalid prospectively, *i.e.*, only from the date of the IOGA decision and not before.

We also agree with the trial court that the conclusion that IOGA applies prospectively is buttressed by application of the Chevron test. The decision in IOGA established a new principle of law in that, prior to the decision, these sorts of taxes were deemed collectible pursuant to statute and precedent. For example, this Court's decision in Rockwell, 228 Pa. 430, 77 A. 665 (Pa. 1910), which was cited by the trial court, held that the land and its subsurface minerals, including oil and gas, can be taxed separately as real estate in certain circumstances involving separate ownership of the land and the mineral rights. We recognize that Rockwell and cases like it were not directly on point for purposes of the question presented in IOGA, and thus, the IOGA decision did not require overruling the precedent. Nevertheless, IOGA acknowledged that cases such as Rockwell "establish, to some extent, oil and gas interests as real estate." IOGA, 814 A.2d at 182 n.5 (collecting cases). IOGA then distinguished those decisions by noting that they arose in the context of disputes between landowners and those to whom they sold oil and gas interests, or between life tenants and the holders of a remainder interest, all of which merely touched on the issue of taxation of the oil and gas interests. Id. Since none of these cases discussed the precise issue presented in IOGA, the question in IOGA is properly viewed as an issue of first impression. But the decision, as a practical matter, unsettled expectations and a long-standing governmental reliance interest.

The other two Chevron factors likewise counsel a prospective-only holding. Applying IOGA retroactively would not forward the operation of the decision because the decision speaks for itself and clearly establishes that the taxes are uncollectible going forward. And, finally, the equities weigh heavily in favor of prospective-only application. Here, as in Smith, the Taxing Authorities collected and made use of the taxes at issue with the good faith belief that they were legally entitled to them. Requiring a refunding of the taxes would cause substantial financial hardship to the communities involved. In addition, the Taxpayers receive substantial relief even from prospective-only application as they will not be subject to this tax going forward. Accordingly, pursuant to the Chevron test, we conclude that retroactive application of IOGA would be inappropriate.

We are aware that, following briefing and argument in this matter, this Court recently decided Kendrick v. District Attorney of Philadelphia County, 591 Pa. 157, 916 A.2d 529 (Pa. 2007), which also addressed retroactivity in the context of statutory interpretation. The issue in Kendrick, as framed in a certified question from the Third Circuit Court of Appeals faced with a federal *habeas corpus* attack upon a final Pennsylvania conviction, was whether this Court's decision in Commonwealth v. Besch, 544 Pa. 1, 674 A.2d 655 (Pa. 1996) should apply retroactively. Besch held that the term "enterprise" as used in the Pennsylvania Corrupt Organizations Act ("Pa.C.O.A"), 18 Pa.C.S. § 911 *et seq.*, did not contemplate enterprises that were wholly illegitimate, such as the drug organizations in which Besch and Kendrick were involved. Kendrick held

that the Besch decision of necessity had retroactive application to the effective date of the statute in part because it was the first instance in which this Court had interpreted the relevant portion of the Pa.C.O.A. For that reason, Kendrick held, our interpretation of the statute in Besch did not create a new rule of law. We reasoned, in part, as follows: "[W]hen we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of existing law." Kendrick, 916 A.2d at 538 (quoting Fiore v. White, 562 Pa. 634, 757 A.2d 842, 848 (Pa. 2000)). We determined that the decision in Besch was entitled to retroactive application because the question presented "(a) involves an interpretation of a statute; and (b) far from involving a mere procedural matter, is a statute which defines criminal conduct." Id. at 539. We have since emphasized that Besch involved a "claim [that] implicates actual innocence on the Pa.C.O.A. charge." Commonwealth v. Williams, Nos. 421 & 422 CAP, 936 A.2d 12, 2007 Pa. LEXIS 2440, 2007 WL 4163877, at *10, A.2d , (Pa. Nov. 26, 2007).

Kendrick obviously is distinguishable from the case *sub judice*.[7] The issue here is the retroactive application of a judicial decision construing a taxing statute, not a decision defining the reach of a statute defining criminal conduct. The McNulty Court

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[7] We note that Kendrick did not cite to, or purport to restrict or modify, McNulty.

contrasted civil and criminal cases, noting that the retroactivity interests involved in civil cases are distinct from those involved in criminal matters:

> The taxpayers argue that applying Scheiner purely prospectively, denying them refunds, would have the effect of discouraging litigants from seeking the overruling of existing precedent. We have noted the force of this argument before. In Commonwealth v. Geschwendt, [500 Pa. 120, 454 A.2d 991 (Pa. 1982)], it was observed that
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> > There appears to be little support for a rule that would limit changes in state law only to future litigants and deny its benefits to the party in the proceeding in which the change is first announced. The concern with such a position is that it would stifle the initiative which is essential to a progressive, dynamic development of a system of justice.

500 Pa. at 128, 454 A.2d at 995-96. This observation, however, was directed particularly to the criminal law area, where the appeal is brought by an "individual defendant who is seeking relief for what is perceived by him to be a personal wrong or injustice [whose] concern is not the future of the law but rather its present application to him." Id. We distinguished the civil law area, where "the resources are available . . ., particularly in commercial matters, to institute and pursue a matter to

> establish new law without expectation of benefit in that lawsuit." Id. In cases such as this, moreover, there is always an incentive, in the avoidance of liability for payment of taxes or fees in the future, to challenge the validity of a statute.

McNulty, 596 A.2d at 789-90.

The equities in criminal matters then -- and particularly in cases involving the scope of conduct that may be deemed criminal -- differ from the equities to be weighed when a civil statute is at issue. A retroactivity decision in a case like Kendrick implicates a fundamental liberty interest which simply is not present in a civil dispute involving a tax statute. This difference in interests is exemplified by the effect of a decision involving retroactivity. IOGA does not subject individuals to criminal liability but rather exempts certain taxpayers from paying *ad valorem* taxes. If a tax statute under which political subdivisions have been collecting taxes is declared invalid by this Court, as happened in IOGA, the future effect on the political subdivisions is clear, and those entities can budget public moneys to account for any decrease in tax revenue. To apply such a decision retroactively, however, subjects the taxing entities to the potentially devastating repercussion of having to refund taxes, budgeted and spent by the entities for the benefit of all, including those who challenged the

tax.[8] In contrast, the Besch decision exempted certain individuals from the reach of a criminal statute, vindicating a liberty interest. Retroactive application of the decision to others who are deemed actually innocent as a result of the holding has no colorable negative consequences for a political subdivision.

Due to the perhaps-unique effect of holding that a decision regarding a tax statute is retroactive, the approach in McNulty (and the Smith plurality) is sensible. To avoid the potentially devastating consequences to taxing entities, it is important that taxes collected pursuant to a valid statute remain valid unless and until otherwise determined by this Court. The incentive to challenge still remains for the challenge, if successful, results in relief from the tax going forward. With respect to tax statutes, then, we reaffirm McNulty in holding that a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively. Accordingly, IOGA does not apply retroactively to invalidate taxes paid by Oz Gas for the three years prior to the issuance of that decision.

Given our conclusion that IOGA has prospective application only, the question of whether Oz Gas is

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[8] The trial court stated that Oz Gas claimed to have paid a total of $ 177,389.28, with interest bringing the total of the refund it sought, exclusive of prejudgment interest, to $ 206,222.83. The Taxing Authorities asserted that their total exposure from all taxpayers during the relevant three-year period totaled nearly $ 1.9 million.

entitled to a refund of taxes paid for the three years prior to the IOGA decision, under Section 5566b, is easily resolved. Section 5566b clearly entitles a taxpayer to a refund only where "the political subdivision is not legally entitled" to the taxes. Pursuant to McNulty, the significance of the prospective application of IOGA is that the taxes at issue were valid until the date of the decision in IOGA, and the Taxing Authorities were legally entitled to collect the taxes prior to that decision. Thus, because the authorities were legally entitled to the taxes paid prior to the IOGA decision, no refund is warranted under Section 5566b.

Accordingly, for the foregoing reasons, the decision of the Commonwealth Court is reversed.

Mr. Chief Justice Cappy, Messrs. Justice Saylor, Eakin and Baer and Madame Justice Baldwin join the opinion.

Pa Commonwealth Court Opinion

Oz Gas, Ltd. v. Warren Area Sch. Dist.

1550 C.D. 2004

COMMONWEALTH COURT OF PENNSYLVANIA

886 A.2d 336; 2005 Pa. Commw. LEXIS 686

October 19, 2005, Argued

November 9, 2005, Filed

OPINION BY: ROCHELLE S. FRIEDMAN

OPINION

OPINION BY JUDGE FRIEDMAN

Oz Gas, Ltd. (Oz) appeals from the July 2, 2004, order of the Court of Common Pleas of the Thirty-Seventh Judicial District, Warren County Branch (trial court), which granted the motions for summary judgment filed by Warren Area School District, Warren County, Triumph Township and Deerfield Township (collectively, the taxing authorities) and denying Oz's cross motion for summary judgment.[9] We reverse.

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[9] Forest Area School District was granted permission to intervene before the trial court, but it later filed a praecipe to withdraw as intervenor, which the trial court accepted with consent of all parties.

From 1999 through 2002, Oz paid *ad valorem* taxes on its oil and gas interests to the taxing authorities pursuant to section 201(a) of The General County Assessment Law (Assessment Law), Act of May 22, 1933, P.L. 853, *as amended*, 72 P.S. § 5020-201(a) (authorizing counties to tax real estate). However, in 2002, our supreme court held in *Independent Oil and Gas Association v. Board of Assessment Appeals*, 572 Pa. 240, 814 A.2d 180 (2002), that section 201(a) of the Assessment Law does not authorize counties to tax oil and gas interests.

As a result, Oz filed a complaint with the trial court, seeking a tax refund for the previous three years under section 1 of the Act of May 21, 1943, P.L. 349, *as amended*, 72 P.S. § 5566b (Refund Law). The taxing authorities filed motions for summary judgment, and Oz filed a cross motion for summary judgment. After considering the motions, the trial court concluded that the Refund Law was not independently retroactive and that, under *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), *Independent Oil* was not to be applied retroactively. Thus, the trial court granted the taxing authorities' motions for summary judgment and denied Oz's cross motion. Oz now appeals to this court. [10]

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[10] Our scope of review is limited to determining whether the trial court committed an error of law or abused its discretion. *Salerno v. LaBarr*, 159 Pa. Commw. 99, 632 A.2d 1002 (Pa. Cmwlth. 1993), *appeal denied*, 537 Pa. 655, 644 A.2d 740 (1994).

Oz argues that the trial court erred in concluding that the Refund Law is not independently retroactive. We agree.

Section 1 of the Refund Law provides, in pertinent part, as follows:

> (a) Whenever any person or corporation of this Commonwealth has paid ... into the treasury of any political subdivision ... any taxes of any sort ... to which the political subdivision is not legally entitled ... the proper authorities of the political subdivision ... are hereby directed to make ... refund of such taxes.... Refunds of said moneys shall not be made unless a written claim therefor is filed ... ***within three years*** of payment thereof.
>
> (b) The right to a refund afforded by this act may ***not*** be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund or otherwise, for recovery of moneys paid as aforesaid, ***unless the claim for refund is for the recovery of moneys paid***

Summary judgment is appropriate only when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

> ***under a provision of a statute***, ordinance or resolution subsequently held, by final judgment of a court of competent jurisdiction, to be unconstitutional, ***or under an interpretation of such provision subsequently held by such court, to be erroneous.***

72 P.S. § 5566b (emphasis added).

The language of this provision is clear and unambiguous. A taxpayer who files a written claim for a tax refund within three years of payment of a tax is entitled to a tax refund if the political subdivision was not legally entitled to collect the tax. 72 P.S. § 5566b(a). Moreover, the taxpayer may seek the tax refund under the Refund Law where the taxpayer's claim is to recover taxes paid under a statutory interpretation of a taxing provision which a court subsequently held to be erroneous. 72 P.S. § 5566b(b). Here, Oz paid taxes to the taxing authorities from 1999 through 2002 under an interpretation of section 201(a) of the Assessment Law which our supreme court subsequently held was erroneous. *Independent Oil*. Thus, Oz has a right to a tax refund for the taxes it paid under section 201(a) of the Assessment Law for the three years prior to the filing of its claim.[11]

Accordingly, we reverse.

ROCHELLE S. FRIEDMAN, Judge

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[11] Because we conclude that the Refund Law is independently retroactive, we need not address whether *Independent Oil* should be applied retroactively under *Chevron Oil*.

Judge Cohn Jubelirer dissents.

ORDER

AND NOW, this 9th day of November, 2005, the order of the Court of Common Pleas of the Thirty-Seventh Judicial District, Warren County Branch, dated July 2, 2004, is hereby reversed.

ROCHELLE S. FRIEDMAN, Judge

Pa Trial Court Opinion

Oz Gas, Ltd. v. Warren Area Sch. Dist.

A.D. 242 of 2003

COMMON PLEAS COURT OF WARREN COUNTY, PENNSYLVANIA

2004 Pa. Dist. & Cnty. Dec. LEXIS 343

July 2, 2004, Decided

OPINION BY: WILLIAM F. MORGAN

OPINION

The matters presently before the Court are Plaintiff's Motion for Summary Judgment and Defendants' Counter Motion for Summary Judgment. After extensive briefing and Argument on all pending Motions, these matters are now ripe for this Court's consideration.

Brief Statement of Facts

In this action, Plaintiff, Oz Gas, Ltd., seeks a refund of real estate taxes based upon the Pennsylvania Supreme Court's decision in *Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County,* 572 Pa. 240, 814 A.2d 180 (2002) (hereinafter *"Fayette County"*). The Court, in *Fayette County,* held that Pennsylvania law, and specifically The General

County Assessment Law, 72 P.S. § 5020-101 to § 5020-602 does not permit *ad valorem* taxation of oil and gas interests as being in the statutorily defined taxable categories of "real estate" or "lands." In addition, Oz Gas seeks interest on the claimed refund pursuant to 72 P.S. §§ 806.1 and 5566b(c)(1), which require interest on tax overpayment refunds. Plaintiff has filed a complaint against Warren Area School District, Warren County, Triumph Township, and Deerfield Township (hereinafter collectively the "taxing authorities") seeking a refund (with interest thereon) of real estate taxes collected by these taxing authorities on oil and gas interests for the calendar years 1999 through 2002.

Plaintiff filed its action against Defendants on May 13, 2003. On July 9, 2003, The County Commissioners Association of Pennsylvania ("CCAP") filed a Petition to Intervene. Likewise, on August 11, 2003, Centre County, Clinton County, Forest County and Jefferson County together filed a Petition to Intervene. On September 29, 2003, CCAP filed a Praecipe to Withdraw County Commissioners Association of Pennsylvania's Petition to Intervene and was accordingly withdrawn from the Intervention proceedings. By Order dated October 10, 2003, this Court denied Centre, Clinton and Jefferson Counties of the right to intervene, but granted the Petition of Forest County. On November 12, 2003, Forest Area School District filed a Petition to Intervene which, on January 20, 2004, was granted by this Court with the consent of all parties. Finally, on February 24, 2004, Intervenor Forest County filed a Praecipe to Withdraw as Intervenor, which, on February 15, 2004, this Court accepted with the consent of all parties. The parties currently

before this Court and subject to this Court's ruling in this matter are Plaintiff, Oz Gas, Ltd. and Defendants Warren Area School District, Warren County, Triumph Township and Deerfield Township. Forest County School District remains captioned as an Intervenor.

Plaintiff in this matter claims, via Affidavit of Richard M. Osborne, that it is owed a refund of taxes, apart from interest, in the amount of $ 177,389.28 (Osborne Aff. P 7). Broken down by Defendant, Plaintiff asserts that it has paid (apart from interest) $ 43,780.29 in refundable taxes to Warren County; $ 125,561.86 to Warren Area School District; $ 6,884.05 to Triumph Township; and $ 1,163.08 to Deerfield Township (*Id.*). Plaintiff further claims that its damages, inclusive of interest to March 1, 2004 (and apart from any "prejudgment interest" awarded by the Court) is equal to $ 206,222.83 (Pl.'s Br. in Supp. of Mot. Summ. J. at 23). As to total revenues collected from all taxpayers, Defendants and Intervenor have submitted affidavits setting forth their respective historical oil and gas tax revenues. For example, through the Affidavit of Jerry Jespersen, Assessor of Warren County, Warren County represents that for the years of 1999, 2000 and 2001, it collected roughly $ 328,576 [12] (Jespersen Aff. P 7). Through the Affidavit of John H. Grant, Superintendent of Warren county School

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[12] This and subsequent revenue figures cited by the Court are only rough estimates calculated by adding each year's revenue figures and rounding to the nearest dollar. These figures are not intended by the Court to represent the exact amount of revenues collected for the years noted.

District, Warren County School District represents that between 1999 and 2001, it collected roughly $ 660,161 (Grant Aff. P 8). Through the Affidavit of Dennis Bee, Secretary/Treasurer of Deerfield Township, Deerfield Township represents that between 1999 and 2001, it collected roughly $ 4,474 (Bee Aff. P 7). In addition, Intervenor Forest Area School District, through the Affidavit of Duane Vicini, represents that between 1999 and 2001 it collected roughly $ 1,206,010 (Vicini Aff. P 8). Triumph Township did not indicate what its total oil and gas tax revenue were for the same period.

The heart of Defendants' and Intervenor's claim is that these taxes are not refundable under 72 P.S. § 5566b alone, and that the Supreme Court's decision in *Fayette County* should not be applied retroactively, thereby enabling Plaintiff to assert a claim that the taxing authorities were not "entitled" to the taxes at the time they were collected. Jurisdiction for this matter is invoked pursuant to 72 P.S. § 5566c [13]

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[13] The exact language of § 5566c reads: In the event of refusal or failure on the part of authorities of the political subdivision involved to make any such refund of taxes, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled, or refusal or failure to pay interest as required by [section 5566b] then the aggrieved person or corporation shall have the right to bring suit for and recover any such taxes, interest, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled, subject to the limitation herein provided, by instituting an action in assumpsit in the court of common pleas of

which authorizes actions in assumpsit to be brought in the common pleas court of the county in which are located tax authorities from whom tax refunds are alleged to be due pursuant to 72 P.S. § 5566b.

Legal Standard

Summary judgments are governed by the Pennsylvania Rules of Civil Procedure, which set forth the standard by which a Motion for Summary Judgment shall be decided. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996). As a general rule, summary judgment may be granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. *Coleman v. Coleman*, 444 Pa. Super. 196, 663 A.2d 741 (Pa. Super. 1995). In determining whether to grant summary judgment, a trial court must resolve all doubts against the movant and examine the record in light most favorable to the nonmovant. *Ney v. Axelrod*, 1999 PA Super 8, 723 A.2d 719 (Pa. Super. 1999). Finally, in a tax case such as this, the Court is wary that a taxing statute must be construed most strongly against the government and in favor of a taxpayer. *Skepton v. Borough of Wilson*, 562 Pa. 344, 755 A.2d 1267 (2000).

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the county wherein such political subdivision is located.

In the case at hand, the parties are in agreement that there are no remaining issues of material fact; this matter is therefore ripe for summary judgment resolution. Additionally, the Court has before it cross Motions for Summary Judgment and, therefore, views each Motion separately and in a light most favorable to the nonmoving party.

Conclusions of Law

As stated in this Court's summary of the facts of this case, *supra*, the issue to be resolved is whether Plaintiff is entitled to a tax refund under the provisions of 72 P.S. § 5566b and § 5566c of the Local Tax Collection Law (72 P.S. § 5511.1, et seq.) (hereinafter "the refund statute"). Plaintiff claims that a refund is due for the portion of its "real estate" taxes that was assessed as oil and gas interests. This claim is predicated on the Pennsylvania Supreme Court's decision in *Fayette County*. In resolving this issue, this Court is faced with two distinct questions. First, is the refund statute independently retroactive? In other words, does the statute alone take the *Fayette County* decision and apply it retroactively? If the answer to this question is in the negative, the second question this Court faces is whether the *Fayette County* decision is to be applied retroactively?

I. Section 5566b Of The Tax Statute Does Not Independently Apply *Fayette County* Retroactively

The statutory section at issue in this case is 72 P.S. § 5566b; the pertinent provisions of the section read as follows:

(a) Whenever any person or corporation of this Commonwealth has paid or caused to be paid, or hereafter pays or causes to be paid, into the treasury of any political subdivision, directly or indirectly, voluntarily or under protest, any taxes of any sort, license fees, penalties, fines or any other moneys to which the political subdivision is not legally entitled; then, in such cases, the proper authorities of the political subdivision, upon the filing with them of a written and verified claim for the refund of the payment, are hereby directed to make, out of budget appropriations of public funds, refund of such taxes, license fees, penalties, fines or other moneys to which the political subdivision is not legally entitled. Refunds of said moneys shall not be made, unless a written claim therefor is filed, with the political subdivision involved, within three years of payment thereof.

(b) The right to a refund afforded by this act may not be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund or otherwise, for recovery of moneys paid as aforesaid, unless the claim for refund is for the recovery of moneys paid under a provision of a statute, ordinance or resolution subsequently held, by final judgment of a court of competent

> jurisdiction, to be unconstitutional, or under an interpretation of such provision subsequently held by such court, to be erroneous. [14]

The first issue with respect to the statute is whether it alone applies the decision in *Fayette County* retroactively. Stated differently, the question is whether the refund statute is independently retroactive. If so, once the *Fayette County* decision was handed down, each political subdivision was determined not to have been "entitled" to tax revenues paid on oil and gas interests for the three years previous to the *Fayette County* decision.

Although there is no case directly on point as to whether or not Section 5566b imposes retroactivity automatically, the Pennsylvania Supreme Court in *American Trucking Associations, Inc. v. McNulty*, 528 Pa. 212, 596 A.2d 784 (1991) has held that when a tax statute before the Court is ruled unconstitutional, the tax is essentially not unconstitutional until declared to be so, and only from that point in time and forward. "The effect of holding *Scheiner* to be prospective only is to establish that the tax declared unconstitutional therein had not been unconstitutional until the Court so ruled. . . 'Because we hold *Scheiner* to apply only

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[14] 72 P.S. § 5566b(c)(1), which is implicated in this action and which is not quoted here, provides for the recovery of interest on any moneys paid that are later deemed eligible for refund.

which authorizes actions in assumpsit to be brought in the common pleas court of the county in which are located tax authorities from whom tax refunds are alleged to be due pursuant to 72 P.S. § 5566b.

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Summary judgments are governed by the Pennsylvania Rules of Civil Procedure, which set forth the standard by which a Motion for Summary Judgment shall be decided. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996). As a general rule, summary judgment may be granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. *Coleman v. Coleman*, 444 Pa. Super. 196, 663 A.2d 741 (Pa. Super. 1995). In determining whether to grant summary judgment, a trial court must resolve all doubts against the movant and examine the record in light most favorable to the nonmovant. *Ney v. Axelrod*, 1999 PA Super 8, 723 A.2d 719 (Pa. Super. 1999). Finally, in a tax case such as this, the Court is wary that a taxing statute must be construed most strongly against the government and in favor of a taxpayer. *Skepton v. Borough of Wilson*, 562 Pa. 344, 755 A.2d 1267 (2000).

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(b) The right to a refund afforded by this act may not be resorted to in any case in which the taxpayer involved had or has available under any other statute, ordinance or resolution, a specific remedy by way of review, appeal, refund or otherwise, for recovery of moneys paid as aforesaid, unless the claim for refund is for the recovery of moneys paid under a provision of a statute, ordinance or resolution subsequently held, by final judgment of a court of competent

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[14] 72 P.S. § 5566b(c)(1), which is implicated in this action and which is not quoted here, provides for the recovery of interest on any moneys paid that are later deemed eligible for refund.

prospectively, flat highway taxation was permissible for highway use that occurred before the date of our decision but not after.'" *McNulty*, 596 A.2d 784 at 789 (citing *American Trucking Association v. Smith*, 488 U.S. 954, 109 S. Ct. 405, 102 L. Ed. 2d 393 (1988)). In *McNulty*, the Court was interpreting Section 503 of the Fiscal Code, 72 P.S. § 503, which is worded differently from the statute now before the Court, Section 5566b, but which has the same significance in that it refers to taxes to which the Commonwealth "is not rightfully or equitably entitled." 72 P.S. § 503. Said section of the Fiscal Code provides for the same type of taxpayer redress for taxes paid to the Commonwealth, as does 5566b for taxpayers who have paid taxes to municipalities within the Commonwealth. Taxes to which the Commonwealth would not be "rightfully or equitably entitled" would include those which have been declared to be unconstitutional or erroneously applied. Yet, *McNulty* held that the statute by itself did not resolve the issue of retroactivity and that the Court had to look to the case which had declared the tax unconstitutional in order to determine whether that case applied its ruling retroactively or prospectively.

The Court in *McNulty* stated that, "A ruling of pure prospectivity would be a determination that the Commonwealth was 'rightfully and equitably entitled' to the taxes paid prior to the date of the Supreme Court's decision in *Scheiner* precluding a claim for refunds under Section 503. . ." *McNulty*, 596 A.2d at 787. (Referring to *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L. Ed. 2d 226 (1987). The Court then analyzed *Scheiner* at great length to determine whether or not it was to be applied retroactively or

prospectively. The Court then applied the three-factor test of *Chevron Oil v. Houston,* 404 U.S. 97, 92 S.Ct. 349, 30 L. Ed. 2d 296 (1971). [15]After the *Chevron* analysis, the Court held that the tax was prospective only. Applying *McNulty* to the instant case it is clear that this Court's decision cannot be based upon a strict analysis of the statutory wording in a vacuum. Instead, the Court must determine whether or not the *Fayette County* decision is retroactive or prospective. If, in this Court's determination, the *Fayette County* decision is retroactive, then Section 5566b(a) would apply and the tax would have been one to which the municipalities were "not legally entitled." However, if this Court determines that the *Fayette County* decision is not to be applied retroactively but is only prospective, then the municipalities were, at the time of collection, legally entitled to the taxes which they collected from the plaintiff for oil, gas and mineral interests and the plaintiff has no valid claim for a refund under Section 5566b(a).

Plaintiffs contend that Section 5566b infers retroactivity anytime that an ordinance or statute is held to be unconstitutional or the interpretation of the statute or ordinance is held to be erroneous. However, subsection (b) is meant to deal with avenues of appeal or review only. Subsection (b) mandates that taxpayers seek alternate remedies (administrative review, appeal, etc.) unless the right to a refund is based upon a decision such as that in *Fayette County.* In light of the rule that "general words shall be construed to take their meaning and

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15 The *Chevron* decision is discussed in greater detail later in this Opinion.

be restricted by preceding particular words", *Fayette County* at 246, 184 (quoting 1 Pa.C.S. § 1903(b)), this Court does not and cannot read subsection (b) to mean anything other than what it says: a taxpayer is not required to pursue alternate refund remedies if the refund is claimed pursuant to a provision of a tax statute subsequently held by a court to be erroneous.

While it is clear that the refund statute contemplates retroactivity, there is nothing in the language of the statute which can mandate that a decision such as that in *Fayette County* is always to be applied retroactively. At the time Plaintiff made its disputed tax payment, the political subdivision was "entitled" to the taxes. The issue of whether the *Fayette County* decision applies retroactively is to be resolved through an analysis of retroactivity case law. Simply because the refund statute contemplates retroactivity, it does not necessarily follow that every court decision in this Commonwealth that holds a provision of a tax statute to be erroneous should be applied retroactively.

II. *Fayette County* Should Not be Applied Retroactively

In concluding that the refund statute does not automatically apply *Fayette County* retroactively, this Court must next examine whether the *Fayette County* decision should be applied retroactively. If the *Fayette County* decision were to apply retroactively, the Defendants in this case would not have been "entitled" to the oil and gas taxes at the time they were collected, and the refund statute would be a viable mechanism for recovering a refund. If, on the other hand, the decision does not apply retroactively, the refund statute is not applicable, as the Defendants would have been "entitled" to the

taxes at the time they were collected. The *Fayette County* decision provides no guidance on the issue of retroactivity, as the Supreme Court did not discuss how its holding should be applied. Therefore, this Court must look to both state and federal case law for instruction.

In deciding the issue of retroactivity, this Court applies the three-factor test of *Chevron Oil.* Although the *Chevron Oil* test of retroactivity has been held to be an invalid test when applied to court rulings on interpretation of federal Constitutional law, it continues to apply to court rulings on interpretation of state law. The United States Supreme Court in *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 113 S.Ct. 2510, 125 L. Ed. 2d 74 (1993) held that a U.S. Supreme Court case determining state taxation of retired federal employees must be applied retroactively. The Court ruled that application of the federal law retroactively would render any *Chevron Oil* analysis unnecessary. The limitation of the *Harper* decision to federal constitutional and case law decisions was clarified by the Pennsylvania Supreme Court in *Annenberg v. Commonwealth,* 562 Pa. 581, 757 A.2d 338 (2000). There the Pennsylvania Supreme Court stated that "where the legal question involved is a federal one, the United States Supreme Court has quite plainly decreed that the federal doctrine of retroactivity cannot be circumscribed by the state courts." *Annenberg,* 757 A.2d at 351. Pennsylvania courts have not applied the *Harper* rule of retroactivity to Pennsylvania court decisions interpreting Pennsylvania state statutes. The *Fayette County* decision resolved the question of whether or not the General County Assessment Law, 72 P.S. 5020-101 to 5020-602, permitted the taxation

of oil, gas and minerals as real estate. The Court determined that "the General Assembly did not authorize the *ad valorem* taxation of their oil and gas interests as found by the lower courts." *Fayette County,* 814 A.2d at 184. This was purely a state decision based on state law. Although it is true that there was an understanding that taxation outside of the boundaries permitted by the general county assessment law is considered unconstitutional, there is no issue as to that basic understanding and it was not disputed by any party to the lawsuit. The Court had no issue before it and no determination to make regarding constitutionality. Instead, the only issue before the Court was the interpretation of a statute that had been passed by the Pennsylvania legislature and which governed taxability of certain subjects of taxation and tax procedure in the Commonwealth. The *Fayette County* decision, not being based on any federal constitutional issues nor issues of federal statutory interpretation, *Chevron Oil* remains as a precedent for this Court to follow in determining retroactivity of said *Fayette County* decision. This Court does not consider *Commonwealth v. Cabeza,* 503 Pa. 228, 469 A.2d 146 (1983) to be precedent because it is not on point. The decision of the Court in *Cabeza* regarded the application of a new procedural rule to criminal cases pending at the time, thus possibly depriving a criminal defendant of his rights. That is a much different factual situation than exists in the instant case wherein the Court is determining the retroactivity of a Supreme Court decision which effectively reversed almost a century of well-established taxation and tax procedure.

The Pennsylvania Supreme Court in *Blackwell v. Commonwealth,* 527 Pa. 172, 589 A.2d 1094 (1991)

states that "although retroactivity is the general rule, a sweeping rule of retroactive application is not justified. Retrospective application is a matter of judicial discretion which must be exercised on a case-by-case basis." *Blackwell v. Commonwealth, State Ethics Comm'n,* 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991). The Court also quotes Justice Roberts in *Gibson v. Commonwealth,* 490 Pa. 156, 413 A.2d 80 (1980) who stated that "the prime impetus behind this occasional willingness not to give a decision full effect is the concern that a novel decision will unfairly prejudice those formerly advantaged by the old rules. . ." *Blackwell,* 589 A.2d at 1100 (citations omitted).

The *Chevron* analysis is three-pronged. This analysis directs this Court to a consideration of three separate but related factors: (1) whether the decision establishes a new principle of law; (2) a balancing of the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) an evaluation of the equities involved in the case and whether retroactive application would produce inequitable results. In applying these factors, the Court concludes that prospective application is appropriate.

With respect to the first *Chevron* factor, this Court concludes that *Fayette County* did announce a new principle of law. Generally, a new principle of law is established if the court has decided an issue of first impression whose resolution was not clearly foreshadowed. *Chevron,* 404 U.S. at 107 (citations omitted). There is no argument that the specific issue that was decided in *Fayette County* was an issue of first impression. Commencing with *Rockwell v.*

Warren County, 228 Pa. 430, 77 A. 665 (1910) local governments have been taxing oil and gas interests for decades. The Supreme Court held in that case that the oil and gas interests underlying unseeded lands were taxable as real estate and, in fact, were actually defined as real estate. Several cases throughout the years from 1910 until the time of the *Fayette County* decision clearly identified oil, gas and minerals as real estate and as taxable. Therefore, the decision of the Court in *Fayette County* was one of first impression and its resolution was not clearly foreshadowed. Further, and through the same analysis, the Supreme Court's decision in *Fayette County* was unpredictable. The unexpectedness of the pronouncement in *Fayette County* is perhaps best illustrated by the trial court's dictum in that very case. The trial court in *Fayette County* held that "it is beyond argument that Appellee Fayette County is authorized to levy taxes on real estate and that it has long been settled in this Commonwealth that oil and gas are considered real estate." [16] *Fayette County,* 814 A.2d at 181. As there is no historical evidence concerning the issue of the taxability of oil, gas and minerals and their inclusion in the definition of the term "real estate," the *Fayette County* decision qualifies as an issue of first impression whose resolution was not clearly foreshadowed. As such, the first prong of the *Chevron Oil* test is satisfied.

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[16] This is the trial court's holding as summarized by the Supreme Court in *Fayette County.*

As for the second factor of *Chevron,* the purpose of the taxing statute is relatively straightforward -- to enable political subdivisions to collect taxes. The Court is inclined to agree with Defendants that the overall effect of the *Fayette County* decision was to grant the plaintiff in that case its relief sought - equitable and declaratory relief. This type of relief is forward-looking. For this Court to assume that a holding awarding forward-looking relief was intended also to apply retroactively would be an impermissible expansion of the specific relief awarded by the Supreme Court in that case. Retroactive operation of the new "rule" would deprive those political subdivisions of the revenues not only counted upon by those political subdivisions but also of those already disbursed for the needs of said local governments in providing services to all of the taxpayers and citizens of the respective counties and townships.

Finally, with respect to *Chevron's* third factor, an examination of the equities in this case conclusively indicates that the *Fayette County* decision should be applied prospectively. In addition to the inequities already alluded to above, one of the worst consequences of a retroactive application of *Fayette County* would be the effect of the *Fayette County* decision on titles to oil, gas and mineral interests in the affected counties. For almost 100 years tax sales resulted from non-payment of taxes levied for oil, gas and minerals. Persons who had not paid their taxes were deprived of their property rights in these interests, which had been considered to be interests in real estate. Subsequent owners purchased the interests at tax sales, operated for oil and gas or leased the oil and gas to producers. Over the years,

those same interests have been passed on from one purchaser to another. However, if *Fayette County* is applied retroactively, this would result in a holding that each of these tax sales was invalid or wrongful, as the tax itself would be deemed void. As a consequence, prior property owners may file actions in ejectment or quiet title actions to restore their rightful claims to the properties lost in tax sales. Not only would the titles to oil, gas and mineral interests within the affected counties be thrown into utter chaos, the purchasers at tax sales who would be deprived of their titles to their purchased oil, gas and mineral interests, could then look to the taxing bodies for restitution of the funds received by those taxing bodies at the tax sale. They could also demand interest. *In Re: Judicial Sale, Tax Claim Bureau of Northampton County,* 720 A.2d 818 (Pa. Commw. Ct. 1998). As Defendants pointed out in their briefs, not only will the Defendants face the possibility of having to repay purchase money and interest going back to a time when they could not possibly have realized that their taxes were invalid, but they may also have to pay costs of litigation as the result of these problems, which are likely to be litigated.

In addition to the above referenced statewide impacts, the Court is cognizant of the equities as to the specific parties in this case. In the instant case, affidavits have been filed by the affected government entities stating the amount of tax revenues collected on oil and gas interests for the years in question. By way of example, Defendants Warren County School District, Warren County and Deerfield Township have alleged that, in total, they collected $ 993,211 of oil and gas tax revenues between the years of 1999 and 2001. While the Court does not know what

Pages A-48 thru A-49 missing in Original

PETITIONER'S BRIEFS BELOW

Pa Sup Ct. Brief (Excerpted)

Docket Nos :10, 11 & 12 WAP 2006

IN THE SUPREME COURT OF PENNSYLVANIA

OZ GAS, LTD,
Plaintiff/Appellee
vs.
WARREN AREA SCHOOL DISTRICT, WARREN COUNTY, TRIUMPH TOWNSHIP AND DEERFIELD TOWNSHIP
Defendants/Appellants
and
FOREST COUNTY AREA SCHOOL DISTRICT
Intervenor/Appellants

BRIEF OF APPELLEE OZ GAS, LTD.

From the Order of the Commonwealth Court
Dated November 9, 2005 at 1550 CD 2004

Joseph E. Altomare
Counsel for Appellee

III. SUMMARY OF ARGUMENT

. . .

(C) The third argument, also raised in *arguendo*, is that if the Court is not compelled by *Harper*, it is nevertheless compelled to accord full retroactivity to *Fayette* under the constitutional principles explained in either or both the U.S. Supreme Court decisions in *Beam, supra,* and *Mckesson, supra*. *Beam* eliminated the practice of "selective" or "modified" retroactivity as offensive to equal protection because such practice results in the application of the new rule to the litigants in the law changing case, but withholds its application to all others who, like the original litigants, had claims arising prior to the decision. Because this Court has already applied the legal conclusion reached in *Fayette* for the benefit of the petitioners then before it, it is under *Beam* precluded from withholding the benefit of that ruling to others, like Oz, whose claims similarly arose before that decision.

IV. ARGUMENT FOR APPELLANT

. . .

(C) RETROACTIVITY IS INDEPENDENTLY COMPELLED BY MCKESSON AND BEAM

Assuming, *arguendo* that retroactivity is not compelled by *Harper*, it is nevertheless independently compelled by each of *Beam, supra,* and *Mckesson Corporation v. Florida*, 496 U.S. 18; 110 S. Ct. 2238; 110 L. Ed. 2d 17 (1990). Neither this Court, nor the U.S. Supreme Court has yet had the opportunity to squarely consider whether the equal protection principles adopted by a plurality of the Court in *Beam*, or the due process principles espoused in its unanimous decision in *Mckesson*, independently compel state courts to eschew "selective prospectivity" irrespective of the federal question trigger required under *Harper, supra.* (See however the Dissenting Opinion by Justice Papadakos in *American Trucking, supra*) Nevertheless, a close reading of each of those cases makes clear that each turn on federal constitutional rights whose boundaries, thanks to the Fourteenth Amendment, range beyond any distinction between state and federal subject matter jurisdiction.

(1) *McKesson*

(2) *Beam*

While *Mckesson's* reach is narrow in that the substantive due process right to retroactivity arises out of the right to just compensation for property appropriated by the government (and arguably would not apply in other than a tax invalidation case), *Beam* rests on broader constitutional ground. It stands on the constitutional principle of equality under the law, a right likewise guaranteed under the federal Constitution and made directly applicable to the states under the Fourteenth Amendment. Like the due process right on which *McKesson* rests, the right to equal protection is a substantive right which guarantees that all persons similarly situated will be afforded the same rights and remedies. It is on this basis that the Court in *Beam* concluded that the practice of "selective" or "modified" prospectivity of judicial decisions should cease, and that once a court applies a new rule to the parties before it, it cannot thereafter rule that its decision cannot benefit other litigants similarly situated.

From *Beam* it follows that state and federal courts are left with only two options – *full* retroactivity or *pure* prospectivity – the latter of which requiring that the plaintiff who first succeeds in changing the law be denied the benefit of that change.

Because the *Fayette* petitioners were afforded the benefit of the new rule there decided, *Beam*, independently of *Mckesson*, moots the Taxing Districts' claim that *Fayette* should not be applied retroactively.

(3) Either or both *Beam* and *McKesson* Require Retroactivity Here

Based on the foregoing, whether considered together or in the alternative, *Beam* and *McKesson* require retroactivity in this case irrespective of the applicability of *Harper* or any consideration under *Chevron*.

(D) EVEN IF NOT COMPELLED BY *MCKEESON* AND *BEAM*, THE COURT SHOULD ADOPT THE PRINCIPLES OF EACH AS APT ADDITIONS TO PENNSYLVANIA LAW

In *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, supra, 579 Pa. at 418-419 (2004), this Court observed that the inexorable trend in this area of the law is away from prospectivity. It there said,

> *This practice of retroactive application arises out of precedent established by the United States Supreme Court. The role of retroactivity in civil cases was originally set forth by the Supreme Court in Chevron Oil v. Huson, 404*

U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), where the Court outlined three factors to consider when deciding whether to apply a new decision retroactively. First, the decision to be applied non-retroactively must establish a new principle of law; second, the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and third, the court must weigh the inequity imposed by retroactive operation. Id. at 106-07. However, with the Court's decision in Harper v. Virginia Department of Taxation, 509 U.S. 86, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993), the Chevron Oil three-step test lost its hold as the dominant approach for retroactive application of new decisions in current civil cases. In Harper, the Court held that "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." Id. at 90. Further, the Court observed that "nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions . . . for near a thousand years.'" Id. at 94 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372, 54 L. Ed. 228, 30 S. Ct. 140 (1910) (Holmes, J., dissenting) (emphasis

> *added)). **While Pennsylvania has traditionally used the analysis set forth in Chevron Oil the decision of the Supreme Court in Harper further strengthens the general principle that changes in law are to be applied retroactively to pending cases.***

[counsel's emphasis]

Oz naturally agrees with that observation. While *Chevron* may not be a dead letter, its utility is certainly on the wane. It has been by-passed by the U.S. Supreme court as constitutionally inappropriate where a tax has been invalidated (*McKesson*), and where a court has already afforded relief to the victors in the rule changing case (*Beam*). It has nevertheless left in its wake a less than cogent jurisprudence (especially if this Court concludes that *McKesson* and *Beam* are not applicable to cases involving the invalidation of a tax on purely state law grounds).

This case presents the Court with a unique opportunity to redefine the role of *Chevron* under Pennsylvania law, and to harmonize state law with significant developments in federal law by adopting, whether or not it is compelled by the Fourteenth Amendment to do so, the principles of *McKesson* and *Beam* as part of Pennsylvania law.

For these reasons, should this High Court be reluctant to accept Oz's argument that the Fourteenth Amendment requires it to follow *Beam* and *McKesson*, the principles of those cases are alternatively urged as apt candidates for express addition to Pennsylvania jurisprudence in this case. Not only are the principles of those cases most surely directly applicable to this case as a matter of constitutional law as herein otherwise argued, but they will supply a critically needed foundation upon which to redefine the limits of Chevron in light of developments in federal law.

. . .

IV. CONCLUSION

For all of the above reasons, the order of the Commonwealth Court reversing the trial court's order granting summary judgment to the Taxing Districts and denying summary judgment to Oz should be affirmed.

Respectfully submitted,

/s

Joseph E. Altomare

Counsel for Appellee

Commonwealth Ct Principal Brief (Excerpted)

Case No: 1550 CD 2004
IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

OZ GAS, LTD,
Appellant
vs.
WARREN AREA SCHOOL DISTRICT, WARREN COUNTY, TRIUMPH TOWNSHIP, DEERFIELD TOWNSHIP, FOREST COUNTY and FOREST AREA SCHOOL DISTRICT
Appellees

BRIEF FOR APPELLANT

Appeal from the Order of the Court of Common Pleas of the 37th Judicial District of Pennsylvania, Warren County Branch, Dated July 2, 2004

Joseph E. Altomare
Counsel for Appellant
Supreme Court ID #17156
228 East Central Avenue
P.O. Box 373
Titusville, PA 16354

. . .

VI. SUMMARY OF ARGUMENT

. . .

The second question, raised in *arguendo*, is whether the Supreme Court's decision in *Fayette* must be in any event regarded as retroactive as a matter of decisional law. Oz believes that it should for three reasons. First, under applicable U.S. Supreme Court precedent the only constitutionally valid opportunity a court has to determine a new rule of law to have "prospective effect only" is in the very case in which the new rule is announced. This is because it cannot both apply the new rule to the litigant's before it and withhold its application to others similarly situated without offending equal protection. Since the "new rule" was applied in *Fayette* for the benefit of the litigants in that case, any question that it should be applied prospectively only thereby became moot.

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VII. ARGUMENT FOR APPELLANT

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(B) THE SUPREME COURT'S DECISION IN *FAYETTE* IS IN ANY EVENT RETROACTIVE AS A MATTER OF DECISIONAL LAW.

(1) *The question of "prospectivity only" is moot.*

While, except where constitutional issues are involved,[17] state courts unquestionably have the power to declare that decisions which announce a change in the law will have prospective effect only, the window of opportunity to do so has been held to close once the litigants in the case in which the new rule is announced are granted the benefit of the new rule. In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529; 111 S. Ct. 2439; 115 L. Ed. 2d 481 (1991) the U.S. Supreme Court determined that "modified" or "selective" prospectivity (so called because it results in the application of the new rule to the litigants in the law changing case, but withholds its application to others similarly situated) was inconsistent with equal protection. The Court held that once a court has applied a new rule of law to the litigants in one case, it must do so with respect to all others who are otherwise not barred by applicable statutes of limitation or *res judicata*. Furthermore, where it does so, any consideration of "prospectivity only" under *Chevron* is mooted.

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[17] See *infra Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993),.

In coming to this conclusion Justice Souter, speaking for the plurality, observed that it is only when the law changes in some respect that an assertion of non-retroactivity may be entertained because a new rule results in having to determine whether the court should apply the old rule or the new one in the case in which it is announced. This threshold question, he says, is really a question of, "choice of law... between the principle of forward operation and that of relation backward." *Id.* at 501 U.S. 529, 534-535. He further explained that,

> *As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, ... Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision.... Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or*

selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused....

But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally. ... For this reason, we abandoned the possibility of selective prospectivity in the criminal context in Griffith v. Kentucky, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) even where the new rule constituted a "clear break" with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review. Though Griffith was held not to dispose of the matter of civil retroactivity [citation omitted], selective prospectivity appears never to have been endorsed in the civil context. Smith, 496 U.S. at 200 (plurality opinion).

Id., 501 U.S. 529, 535-538

Both parties have assumed the applicability of the Chevron Oil test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear)

> *where a decision displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. See Chevron Oil, 404 U.S. at 106-107.* ***But we have never employed Chevron Oil to the end of modified civil prospectivity.***

Id., 501 U.S. 529, 538 (1991) [counsel's emphasis]

> *The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.*

Id., 501 U.S. 529, 544

There can be little doubt that the successful appellants in *Fayette* reaped the benefits of the Court's determination that the tax which had been assessed against them was invalid and did not have to be paid: The Court could have but did not, announce the new rule as purely prospective (i.e., making it applicable *in futuro*, but not to the litigants then before the Court). Because it did not, the issue of "prospectivity only" is mooted.

. . .

Respectfully submitted,

By /s

Joseph E. Altomare

Counsel for Appellant

Commonwealth Ct Reply Brief (Excerpted)

No. CD 2004
IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

OZ GAS, LTD,
Appellant
vs.
WARREN AREA SCHOOL DISTRICT, WARREN COUNTY, TRIUMPH TOWNSHIP, DEERFIELD TOWNSHIP, FOREST COUNTY and FOREST AREA SCHOOL DISTRICT
Appellees

REPLY BRIEF FOR APPELLANT

Appeal from the Order of the Court of Common Pleas of the 37th Judicial District of Pennsylvania, Warren County Branch, Dated July 2, 2004

Joseph E. Altomare
Counsel for Appellant

REPLY ARGUMENT FOR APPELLANT

Without hereby suggesting any acquiescence to any of the other contentions raised by the Taxing Districts in their brief, Oz respectfully desires to address certain specific of those contentions by way of the following reply.

(A) *Beam & Harper*

In its principal brief Oz contends that if the ruling of *Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County,* 572 Pa. 240, 814 A.2d 180 (2002) ("*Fayette*") was a "new rule" which legitimately gave rise to any question as to its prospective or retroactive application, that question was mooted under *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529; 111 S Ct. 2439; 115 L. Ed. 2d 481 (1991) (which proscribes "selective prospectivity")[18] because that new rule was applied to the litigants in *Fayette* itself. [Oz principal brief, p.9]

To this proposition the Taxing Districts make two arguments. First, that *Beam Distilling* has been "obliterated" by, and "merged" into, by *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993) [see Warren Area School District, et al, brief, p. 12]; and second, that

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[18] *Beam* describes "selective prospectivity " as that theoretical option in which the court establishing a new rule applies that rule for the benefit of the litigants before it, but otherwise restricts it to prospective application.

because the petitioners in Fayette only requested declaratory and equitable relief, the "new rule" was not applied for their benefit.

1. *Beam* was not "obliterated' by *Harper* – it controlled *Harper*.

Beam was neither "obliterated" by nor "merged" into *Harper*. That it not only survives, but actually controlled *Harper* is plainly evidenced in Justice Scalia's majority opinion in that case.

> ***Beam controls this case,*** *and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends Griffith's ban against "selective application of new rules." 479 U.S. at 323.*

Harper supra, 509 U.S. at 97. [counsel's emphasis]

Notably, the analogue to *Fayette* in *Beam* was *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L.

Ed. 2d 200, 104 S. Ct. 3049 (1984) [which struck down the tax there in question] and, like here, the question presented in *Beam* was,

> *...whether our ruling in Bacchus... should apply retroactively to claims arising on facts antedating that decision.*

Beam, supra, 501 U.S. at 532.

The key to the Courts holding was that *Bacchus*, not unlike *Fayette*,

> *...applied its own rule, just as if it had reversed and remanded without further ado ...*

Beam, supra, 501 U.S. at 540.

It is of course true that the "new rules" which were the subject of both *Beam* and *Harper* were matters of federal law, and that *Harper* expressly requires that state courts follow its lead on federal questions. See *Annenberg v. Commonwealth*, 562 Pa. 581, 757 A.2d 338 (2000). Each of these cases after all dealt with a substantive issue arising under the Commerce Clause of the U.S. Constitution. Because of this, it is not surprising that the Court did not range beyond its power under the supremacy clause to require state courts to follow its lead on federal questions. But, even if Oz's argument in its principal brief that *Fayette* also turned on federal constitutional law is incorrect [Oz principal brief, p. 11], neither the U.S. Supreme Court nor our

Supreme Court has ever ruled that the underlying principle of *Beam* – that "selective prospectivity" offends equal protection -- is not under the Fourteenth Amendment applicable to state judiciaries in ruling on purely state questions.

Harper imposed *Beam* on the states with respect to federal questions under the supremacy clause without discussion of whether *Beam* would compel the same result as to purely state questions. Because a federal question was involved, any such discussion was unnecessary. However, the driving principle on which *Beam* itself turns has nothing to do with the supremacy of federal court rulings on federal questions, but rather upon the substantive right of citizens to be equally treated under the law – a right which under the Fourteenth Amendment is as applicable to purely state questions as it is to federal questions. It is in this, the equal protection sense, which *Beam* not only compelled the result in Harper, but is invoked as controlling here.

In considering these contentions, Oz should not be understood to contend that *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) is a dead letter. It is not contended that *Beam* or *Harper* in any way overruled *Chevron*. *Harper* and *Beam* merely stand for the proposition that once a court which announces the new rule decides to apply it to the litigants before it, the judicial prerogative to consider (under *Chevron* or otherwise) anything less than full retroactivity is lost. And, as discussed hereunder, this is precisely the situation which obtains in this case.

2. The "new rule" in *Fayette* was applied to the litigants in that case.

The Taxing Districts' contention [see Warren Area School District, et al, brief, p. 12] that the declaratory and equitable relief afforded the petitioners in *Fayette* does not constitute an application of the new rule for their benefit within the meaning of *Beam* is simply untenable.

The Supreme Court itself described the case before it as follows:

> *Appellants own leasehold interests in oil and gas underlying tracts of land located in Fayette County. In June 1998, Appellee, the Board of Assessment Appeals of Fayette County, began to assess Appellants' oil and gas interests for purposes of real estate taxation. Thereafter, the Board began serving Appellants with assessment notices regarding their oil and gas interests and informing them of their right to appeal within 40 days thereof.*
>
> *... On August 14, 1998, Appellants filed an action for declaratory and equitable relief with the common pleas court, alleging, inter alia, that the Board's imposition of ad valorem taxes on oil and gas interests was illegal, unauthorized by the laws of the*

> *Commonwealth and violative of the constitutions of Pennsylvania and the United States.*

Fayette, 572 Pa. 240, 241-242.

It is further noted in the Commonwealth Court's opinion from which the appeal was taken that,

> *By stipulation the parties agreed that all tax sales of oil and gas interests shall be stayed and held in abeyance and that there shall be no tax sales of any oil or gas interests during the pendency of this action.*

Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals, 780 A.2d 795, 797 (Pa. Commw. Ct., 2001), footnote 1.

By this it is clear that the declaratory relief requested was not merely forward looking relief. The tax assessments being appealed from had in fact been made; the appellants had not paid the tax levied thereon; and, but for the stipulation, the appellants were otherwise subject to payment – all prior to commencing their claim. There can accordingly be no question that but for the application of the "new rule" in *Fayette* to the advantage of the appellants then before the Court, they would have had to pay the taxes already assessed. Just as clearly, the declaratory relief requested (and obtained) was not simply a declaration that a *threatened* tax would be invalid *if*

levied, but rather that subsisting assessments with which the appellants were already burdened be themselves declared invalid and not collectable.

Because this was clearly so in *Fayette*, equal protection bars as moot any consideration of non-retroactivity as to Oz in this case.

. . .

CONCLUSION

For all of the above supplemental reasons as well, the order of the lower Court granting summary judgment to the Taxing Districts and denying summary judgment to Oz should be reversed with directions that summary judgment be entered in favor of Oz for the amount shown in the uncontested record to be due.

Respectfully submitted,

/s/
Joseph E. Altomare
Counsel for Appellant

Trial Ct. Brief (Excerpted)

Case No: A.D. 242 of 2003

IN THE COURT OF COMMON PLEAS
FOR THE 37th JUDICIAL DISTRICT OF
PENNSYLVANIA
WARREN COUNTY BRANCH

OZ GAS, LTD,
Plaintiff
vs.
WARREN AREA SCHOOL DISTRICT,
WARREN COUNTY, TRIUMPH
TOWNSHIP, and DEERFIELD
TOWNSHIP,
Defendants
And
FOREST COUNTY AND FOREST
AREA SCHOOL DISTRICT,
Intervenors

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Plaintiff Oz Gas, Ltd ("Oz") by and through its counsel, undersigned, respectfully submits hereby its brief in support of summary judgment as against Defendants Warren Area School District (hereinafter the "School District"), Warren County (hereinafter the "County") and Triumph and Deerfield Townships (the "Townships").

. . .

DISCUSSION

1. *Fayette* Must Be Applied Retroactively

The first of the legal defenses – that *Fayette* should not be applied retroactively – is without merit for a legion of reasons.

> *As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the* **norm,**....
>
> *Second, there is the purely prospective method of overruling, under*

which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision....

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. ...But selective prospectivity also ***breaches the principle that litigants in similar situations should be treated the same,*** *a fundamental component of stare decisis and the rule of law generally.*

James B. Beam Distilling Co. v. Georgia , 501 U.S. 529, 534; 111 S. Ct. 2439, 2443; 115 L. Ed. 2d 481, 447 (1991) [counsel's emphasis].

• • •

Plaintiff accordingly seeks summary judgment in such aggregate amount as against each of the Defendants as shall include pre-judgment to date of entry

Respectfully submitted,

/s

Joseph E. Altomare
Counsel for Plaintiff